the medium which creates the required privity.[23] Where the term privity has been thus construed, there would appear to be no reason why all burdensome covenants which touch and concern the land should not bind grantees in fee. It is submitted, however, that a fundamental objection to a burdensome covenant is that it binds the land in perpetuity and tends to restrict its alienation at the caprice of some remote grantor,[24] and the courts should, therefore, follow the example of Chancery and exercise their discretion in enforcing agreements absolute in their effects, so that such burdens only will be upheld as can be imposed consistently with policy and principle.[25]

Certain jurisdictions which have not altogether rejected the orthodox conception of privity, have nevertheless permitted the burden of a covenant to run at law where it tends to support an easement. This relation, known as "substituted privity", exists where some subordinate interest is granted or retained by the grantor, and the covenant is necessary to the substantial enjoyment of the subordinate interest.[26] In certain other instances the burden and benefit are so inseparably connected that the grantee must take the benefit subject to the burden.[27] The principle of "substituted privity" has sometimes, however, been extended to cases in which the covenant touched and concerned the subordinate interest, but was neither necessary to nor bound up in the complete enjoyment thereof, as in the recent case of *Parrott* v. *Atlantic & North Carolina R. R.* (N. C. 1914) 81 S. E. 348, in which the plaintiff's ancestor granted a right of way to a railroad company which covenanted to erect and maintain a flag station. The covenantor assigned to the defendant, and the court decreed that the latter should continue to maintain the flag station, provided the public interests were not injuriously affected.[28] It appears to be settled that a covenant will run with an incorporeal hereditament[29] as well as with tangible realty, and if the land may be said to be the medium creating privity of estate, there would seem to be no reason why an incorporeal hereditament should not serve equally well as such medium.

ENFORCEMENT OF FORFEITURE CONDITIONS IN LEASES FOR YEARS.—When a lease for years contains a proviso that the lease shall become void on non-payment of rent or on default in the performance of any of the lessee's covenants, the enforcement of such a stipulation is gov-

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[23]See Aiken *v.* Albany etc. Ry. (N. Y. 1851) 26 Barb. 289; Allen *v.* Culver (N. Y. 1846) 3 Den. 284. Since the running of a benefit may be explained as the implied assignment of a chose in action, it does not appear necessary that any estate pass in order to create privity. See Shaber *v.* St. Paul Co., *supra.*

[24]See Keppel *v.* Bailey, *supra;* National Union Bank at Dover *v.* Segur, *supra,* p. 184.

[25]See Sexauer *v.* Wilson (1907) 136 Ia. 357.

[26]Fitch *v.* Johnson (1882) 104 Ill. 111; Norfleet *v.* Cromwell, *supra;* Bronson *v.* Coffin, *supra.*

[27]Midland Ry. *v.* Fisher (1890) 125 Ind. 19; Horn *v.* Miller (1890) 136 Pa. 640.

[28]See 14 Columbia Law Rev. 612. A grant of a right of way to a railroad has been construed in North Carolina as conferring an easement only. See Raleigh etc R. R. *v.* Sturgeon (1897) 120 N. C. 225.

[29]Bally *v.* Wells, *supra;* Van Rensselaer *v.* Hays, *supra;* Sterling Hydraulic Co. *v.* Williams (1872) 66 Ill. 393.

erned by very strict rules. According to the early English authorities, the effect of the proviso was to terminate the lease *ipso facto* upon a breach of the condition. This rule rested upon a distinction drawn by Lord Coke between conditions annexed to estates for years and those annexed to freeholds, the argument being that since an estate of freehold commenced with the formality of livery of seisin, it could not be determined upon breach of a condition without the formality of entry, whereas a term for years began without ceremony and so ended without ceremony immediately upon condition broken.[1] It soon became apparent that such a rule enabled a tenant, who wished to be freed from a troublesome lease, to avoid it at will by simply failing to pay his rent. In order, therefore, to prevent the lessee from thus taking advantage of his own wrong, the courts have since declared that even though it is provided ever so explicitly that the lease shall become void upon breach of a stipulation, the lease will be held merely voidable at the option of the lessor, and that no breach shall terminate the tenancy until the landlord has in some way signified his intention that it shall do so.[2] The earlier English rule has sometimes been followed in this country;[3] and it has been well argued that the modern rule is too strict in overriding the express stipulations of the parties to the lease, and that there is no hardship in binding the parties to the terms on which they agreed.[4] The modern rule, however, is now accepted by the great majority of our courts, which hold that the lease is not destroyed until the landlord exercises his option to avoid it.[5]

Just how that election shall be signified is a question about which there is some difficulty. When condition is broken by non-payment of rent, it is well settled that before the landlord can terminate the lease, he must first formally demand the rent in accordance with certain very technical rules,[6] unless the necessity for such demand is explicitly dispensed with by the lease,[7] or by some statute.[8] But assuming that the landlord has either made proper demand, or has been relieved of the necessity of making it, he must still signify his election to avoid the lease. In England, it appears that he must do this either by actual re-entry, or by that which is in law equivalent to re-entry, namely, by issuing in unequivocal terms a writ for the recovery of possession.[9] In this country, a few courts have said that any

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[1]Pennant's Case (1596) 3 Co. 64a; Co. Lit., 214b.

[2]Rede *v.* Farr (1817) 6 M. & S. 121; Davenport *v.* Queen, L. R. [1877] 3 A. C. 115, 128-130.

[3]Sheaffer *v.* Sheaffer (1861) 37 Pa. 525; see Parmelee *v.* Oswego & Syracuse R. R. (1851) 6 N. Y. 74; Guffy *v.* Hukill (1890) 34 W. Va. 49; *cf.* 4 Kent, Comm., *128.

[4]See Shanfelter *v.* Horner (1895) 81 Md. 621.

[5]Wills *v.* Manufacturers' Natural Gas Co. (1889) 130 Pa. 222; Clark *v.* Jones (N. Y. 1845) 1 Den. 516; Deaton *v.* Taylor (1893) 90 Va. 219; 2 Tiffany, Landlord & Tenant, 1369.

[6]Parks *v.* Hays (1893) 92 Tenn. 161; Johnston *v.* Hargrove (1885) 81 Va. 118; 2 Tiffany, Landlord & Tenant, § 194f.

[7]Pendill *v.* Union Mining Co. (1887) 64 Mich. 172; see Camp *v.* Scott (1879) 47 Conn. 366.

[8]Martin *v.* Rector (1890) 118 N. Y. 476; 1 McAdam, Landlord & Tenant, §§ 188-189.

[9]Woodfalls, Landlord & Tenant (19th ed.) 364; Moore *v.* Ullcoats Mining Co., L. R. [1908] 1 Ch. 575.

clear assertion of the landlord's election is sufficient,[10] and this seems correct on principle, being in accord with the general rule regarding elections. Furthermore, the rule is a fair one in view of the attitude of the courts in construing as a waiver of the right to forfeiture, every word or act of the landlord which can possibly be interpreted as a recognition of the continuance of the tenancy after the landlord has learned of the tenant's breach.[11] The decisions, however, are unsatisfactory on this point; and until the courts come to recognize more clearly the obvious distinction between a provision allowing a landlord to re-enter for breach of a condition, and one that, in such a case, the lease shall become void,[12] the landlord would always do well to signify his election by re-entry, or, in most States, he may follow the course pursued in the recent case of *Matthews* v. *Crofford* (Tenn. 1914) 167 S. W. 695, where the landlord sought to enforce a forfeiture for non-payment of rent by bringing an action to recover possession. The tenant tried to defeat the forfeiture by tendering the accrued rent and interest into court, claiming that since there had been no re-entry, the tender was in time to destroy the landlord's right to avoid the lease. But the court, following a recognized corollary to the general rule, held that the bringing of the action was equivalent to an actual re-entry.[13] It further intimated that unless the landlord could make actual entry peaceably, he should not make it at all. This doctrine, also, is not without support;[14] but some courts still cling to the common law rule allowing forcible re-entry,[15] despite the fact that the reasons for that rule have disappeared, and that the rule itself is not conducive to the peace and good order of society.

It is submitted that in the principal case, the tenant would have stood a much better chance of succeeding had he sought his relief in equity. The courts look on forfeitures with disfavor,[16] and where, as here, one is incurred by the tenant's default in paying rent, it is well settled that a court of equity will set it aside.[17] This right of the tenant in equity is very similar to the equity of redemption which Chancery allows a defaulted mortgagor. It rests upon the theory that the proviso for forfeiture is intended merely as security for the payment of money, and that full effect can be given to it by allowing the

[10]Bowman *v.* Foot (1860) 29 Conn. 331; Alexander *v.* Hodges (1879) 41 Mich. 691. A reletting by the landlord to another person has been held sufficient. Guffy *v.* Hukill, *supra;* Alleghany Oil Co. *v.* Bradford Oil Co. (N. Y. 1880) 21 Hun 26.

[11]See Green's Case (1582) Cro. Eliz. 3; Croft *v.* Lumley (1857) 6 H. L. C. 672, 693, 704 *et seq.;* Chase *v.* Knickerbocker Phosphate Co. (N. Y. 1898) 32 App. Div. 400; Hopkins *v.* Levandowski (1911) 250 Ill. 372.

[12]This was recognized in Guffy *v.* Hukill, *supra.*

[13]Jennings *v.* Bond (1895) 14 Ind. App. 282. This is established by statute in some States. See Cruger *v.* McLaury (1869) 41 N. Y. 219.

[14]Peacock & Hunt Co. *v.* Brooks Co. (1895) 96 Ga. 542; Thiel *v.* Bull's Ferry Land Co. (1895) 58 N. J. L. 212.

[15]Goshen *v.* People (1896) 22 Colo. 270; Fabri *v.* Bryan (1875) 80 Ill. 182.

[16]See Mexborough *v.* Whitwood etc. Council, L. R. [1897] 2 Q. B. D. 111.

[17]Palmer & Singer Mfg. Co. *v.* Barney Estates Co. (N. Y. 1912) 149 App. Div. 136; Adams *v.* Watson (1877) 59 Ala. 524; 1 Pomeroy, Eq. Jur. (3rd ed.) § 453.

tenant to pay the rent in arrears with interest and costs.[18] Where the forfeiture is for a cause other than the non-payment of money, equity is not so likely to set it aside in the absence of fraud, accident or mistake;[19] but whenever the parties can be put *in statu quo* by the mere payment of money, it seems that there are few cases in which the court will refuse relief.[20]

AVOIDANCE OF INSANE PERSONS' CONVEYANCES.—The voidable conveyance of an insane person may be disaffirmed,[1] and the property regained by his guardian or committee, or after a return to sanity by himself, or after his death by his personal representative or heirs;[2] and this right may even be exercised against *bona fide* purchasers from the grantee.[3] As to the method which should be employed to avoid the conveyance, however, there is a conflict of authority. In the recent case of *Walton* v. *Malcolm* (Ill. 1914) 106 N. E. 211, it was held that the heirs of a grantor alleged to have been insane at the time of making a conveyance, could not give evidence of such insanity in an action of ejectment brought by them against the heirs of the grantee to recover possession of the land.[4] It is axiomatic that legal title alone can support an action of ejectment,[5] and since the deed is merely voidable, it is said to pass the legal title and be avoidable only upon equitable grounds.[6] Nevertheless, in most jurisdictions, a grantor, insane at

[18]See Horton *v.* New York & H. R. R. R. (1883) 12 Abb. N. C. 30, affd. 102 N. Y. 697.

[19]Gordon *v.* Richardson (1904) 185 Mass. 492; see Sheets *v.* Sheldon (1868) 7 Wall. 416; Kann *v.* King (1907) 204 U. S. 43.

[20]It is said that equity will grant relief even where the tenant's default is wilful. See Mactier *v.* Osborn (1888) 146 Mass. 399. In fact, the tenant is so favored, that in the principal case it might still not be too late for him to seek relief, for even in States where courts of law and equity are united, and a defendant is required to set up by answer any equitable defense or right to affirmative relief which he may have, it is held that the tenant does not lose his right to an injunction by failing to set it up against the landlord's action for possession. Giles *v.* Austin (1875) 62 N. Y. 486.

[1]As to what contracts and conveyances are voidable, see 14 Columbia Law Rev. 674.

[2]1 Devlin, Real Estate (3rd ed.) § 75.

[3]Hovey *v.* Hobson (1867) 53 Me. 451; Dewey *v.* Allgire (1893) 37 Neb. 6; *contra,* Odom *v.* Riddick (1889) 104 N. C. 515. Most courts make a return of the consideration a condition precedent to avoidance, on the ground that it is inequitable to take land from an innocent grantee unless he can be put *in statu quo.* 1 Devlin, Real Estate (3rd ed.) § 76. Others, on the contrary, hold that to require restitution would be to withdraw the very protection which the law seeks to afford. Gibson *v.* Soper (Mass. 1856) 6 Gray 279; see Hovey *v.* Hobson, *supra.*

[4]The following cases support this view: Moran *v.* Moran (1895) 106 Mich. 8; McAnaw *v.* Clark (1902) 167 Mo. 443.

[5]Shipman, Common Law Pleading, 123; Fenn *v.* Holme (1859) 62 U. S. 481, 483.

[6]Warvelle, Ejectment, § 334. The right of the insane person to recover his property can hardly be said to be equitable only, since the right of recovery exists even against *bona fide* purchasers for value. See note 2, *supra.*